

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2027

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-2027

ALBERT MASCOLO,

Appellant,

-VS-

UNITED STATES OF AMERICA,

Appellee.

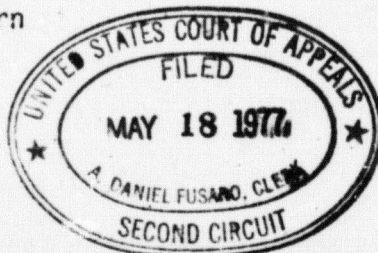
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

John R. Bartels, J.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Albert Mascolo appeals from the denial of his Motion to Vacate, Correct or Set Aside Sentence pursuant to 28 U.S.C. §2255 (1971), by order of the United States District Court for the Eastern District of New York (Bartels, J.) dated December 9, 1976.

The essential facts of this case are not in dispute. Upon his conviction for conspiracy to sell heroin and possession of heroin, Mr. Mascolo was sentenced on June 8, 1973 by United States District Judge John R. Bartels to a term of five years of imprisonment and seven years of special parole. (Appellant's Br. at 3). At the sentencing proceeding, Judge Bartels examined and made specific reference to a presentence report prepared for his use. (Appellant's Br. at 3). Subsequently, it was determined that the presentence report used by Judge Bartels contained items of misinformation and extraneous information. (Appellant's Br. at 4-5, 6-10).

In May, 1976, Mascolo moved to have his sentence vacated, corrected or set aside on the ground that the sentencing proceeding was constitutionally defective because Judge Bartels relied on material misinformation and extraneous information, and thus his sentence was invalid. The denial of that motion is the subject of the instant appeal.

ARGUMENT

MASCOLO'S SENTENCE SHOULD HAVE BEEN
VACATED BECAUSE THERE WAS A POSSIBILITY
THAT JUDGE BARTELS RELIED ON MISINFORMATION
AND EXTRANEOUS INFORMATION AT SENTENCING

The government argues that the "complete answer" to Mascolo's claim is that there has been no showing of reliance on the improper information. (Appellee's Br. at 9). This answer is simply wrong. As Mascolo demonstrates in his first brief to this Court, "explicit, demonstrated or otherwise clearly evidenced reliance" need not be proved. Rather

[w]here there is a possibility¹² that sentence was imposed on the basis of false information or false assumptions concerning the defendant,... the sentence will be vacated.

12/ Actual reliance need not be shown...

United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976) (emphasis in original).

To the extent that this statement conflicts with language in Ferranto v. United States, 507 F.2d 408 (2d Cir. 1974), which is relied upon by the government (Appellee's Br. at 10-11), the Robin test is controlling, for it more accurately interprets United States v. Tucker, 404 U.S. 443 (1972). Tucker teaches that if there is a reasonable probability that improper information is called to the attention of the sentencing court and if there is a reasonable probability that the sentencing court relied on the misinformation, then resentencing is required.

Contrary to the government's assertion that reliance on the misinformation has not been shown, here there was a possibility that Judge Bartels relied on the defective presentence report. First, the fact that the misinformation and extraneous information were contained in the presentence report establishes the reasonable probability that Judge Bartels' attention was directed toward the improper material. Second, the fact that Judge Bartels stated that he knew Mascolo's background and had read the report (App. 15) and the fact that he became engaged with Mascolo's trial counsel in a discussion about another section of the report (App. 15-18), evidence a reasonable probability that he relied on the improper material. Thus, under the Robin test, Mascolo's sentence should have been vacated in the court below.

Judge Bartels' disclaimer of reliance on the improper information, upon which the government heavily depends (Appellee's Br. at 10-11), is unavailing, as was the trial court's similar disclaimer in Tucker. See, United States v. Tucker, supra, 404 U.S. at 452 (Blackmun, J., dissenting). Under the Tucker "reasonable probability" test, the sentencing court's after the fact denial of reliance on improper information is entitled to no weight once a possibility of reliance is shown. To hold otherwise would deprive the Tucker decision of all meaning.

CONCLUSION

The order of the District Court denying Mascolo's Motion to Vacate, Correct, or Set Aside Sentence . ould be reversed; his sentence should be vacated; and the case should be remanded for resentencing by a different judge without use of the misinformation and extraneous information included in the defective presentence report.

Respectfully submitted,

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C TIFICATE OF SERVICE

I hereby certify that two copies of the foregoing reply brief have been mailed, postage prepaid, to William C. Brown, Esq., Appellate Section, Criminal Division, Justice Department, c/o T. George Gelinsky, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044 this day of May, 1977.

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